United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2137

To be argued by
ELKAN ABRAMOWITZ

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-2137

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UNITED STATES ex rel. JOHN KELLEHER,

Petitioner-Appellant,

-v-

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

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On Appeal From The United States District Court
For The Southern District of New York

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P/S

BRIEF ON BEHALF OF PETITIONER-APPELLANT JOHN KELLEHER

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JOHN KELLEHER

Preliminary Statement

By petition filed November 4, 1974, relator, then an inmate at the Auburn Correctional Facility, Auburn, New York,* moved the United States District Court for the Southern District of New York for a Writ of Habeas Corpus, pursuant to Title 28, United States Code, Sections 2241 and 2254. The grounds of the petition were that relator's

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* Relator is currently incarcerated in the Wallkill Correctional Facility, Wallkill, New York.

conviction was violative of the Fourteenth Amendment to the Constitution of the United States, in that he was not aware of the maximum or minimum terms to which he might be sentenced upon his plea of guilty to an indictment in the Supreme Court of the State of New York, County of New York.

The district court, the Honorable Henry F. Werker, United States District Judge, by order dated January 20, 1975, directed that an evidentiary hearing be held "to determine whether the plea of guilty entered by the petitioner was made with an understanding of the consequences of the plea." Respondent moved for reargument of the aforesaid order; that motion was denied by order dated February 28, 1975.

An evidentiary hearing was held before Judge Werker on April 17, 1975. By memorandum decision and order dated August 6, 1975,* Judge Werker denied the petition. He held that petitioner had not fully presented the substance of his claim to the State Courts, but because of the possibility that collateral remedies might no longer be available thereby meeting the exhaustion requirements of the statute, went on to address the merits of the petition. In so doing,

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* A copy of the district court's decision and order follow the Conclusion of this brief.

the district court said that the plea of guilty was valid because petitioner had not persuaded the court "that his lack of knowledge of the maximum and minimum terms affected his ability to make an intelligent decision." The court found that "it would be incredible to conclude that petitioner would not have plead [sic] guilty had he known that he faced a maximum of twenty-five years."

On September 30, 1975, the district court issued a certificate of probable cause, pursuant to the provisions of 28 U.S.C. §2253, thereby permitting appeal to this Court. By order dated the same date, the district court also granted petitioner's application to prosecute this appeal in forma pauperis. Accordingly, under the provisions of Rule 30(f) of the Federal Rule of Appellate Procedure and Section 30(2) of the Rules of this Court, this appeal is being taken on the original record and no appendix will be filed. As required by Section 30(2), three copies of the transcript of the hearing before Judge Werker are being filed herewith.

STATEMENT OF FACTS

A - The Trial and the Guilty Plea

Petitioner was indicted on June 30, 1971 and charged with Attempted Murder and Possession of a Weapon as a Felony, in the Supreme Court of the State of New York, County of New York, Indictment No. 3446/1971. On December 9, 1971, petitioner proceeded to trial before Hon. George Starke, J.S.C. and a jury; he was represented by Richard J. Ferguson, Esq., an attorney assigned by the Appellate Division of the Supreme Court, First Judicial Department. Immediately upon the close of the People's case, Mr. Ferguson and the Assistant District Attorney approached the bench. Mr. Ferguson informed the Court that the defendant wished to enter a plea of guilty and the plea was taken immediately thereafter.

On January 11, 1972, Justice Starke sentenced petitioner to a maximum term of twenty-one years and a minimum term of seven years. Notice of appeal was timely filed thereafter.

The transcripts of the trial and of sentencing reveal that at no time did Justice Starke ever inform petitioner of the minimum or maximum sentences for the crimes charged in the indictment, although he did tell petitioner that he faced a

"big" and a "stiff" sentence. At the evidentiary hearing held below, both petitioner and Mr. Ferguson testified that they had never discussed the range of sentencing possibilities available to the court. Mr. Ferguson testified that he never informed petitioner of the maximum term to which he might be sentenced upon a conviction or plea of guilty at any time, either before or during the trial (T.6),* before or during the plea of guilty (T.8) or before or during the sentence (T.9). Petitioner testified that he had not known what the maximum term to which he might be sentenced was (T.39-40) and that he did not learn of the same until after his incarceration upon the conviction herein (T.41-42).

Pursuant to leave granted by the court at the evidentiary hearing (T.82-83), counsel for petitioner contacted two attorneys who had represented petitioner at an early stage of the State court proceeding. Counsel represented to the Court that both attorneys told counsel they had never discussed maximum sentences with the petitioner and respondent did not challenge the representation; this corresponds with petitioner's testimony as well (T.43-48).

Respondent did not seek to present any proof contrary to the testimony of Mr. Ferguson or the petitioner.

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* References are to the transcript of the evidentiary hearing held April 17, 1975.

B - Post-Trial Events

On February 10, 1972, the Appellate Division granted petitioner's motion for permission for leave to appeal as a poor person and appointed Robert Kasanof of the Legal Aid Society to be counsel on the appeal. The brief in support of the appeal argued that the trial court should have inquired, at the time of sentence, to ascertain whether the petitioner had made his plea with "understanding of the meaning and consequences" of it (Brief, pages 4-6). It was argued that because of the sudden nature of the plea and because of Mr. Ferguson's argument about the similarity of attempted murder with assault, there was a distinct possibility that petitioner's plea was not knowingly made. The brief requested that a hearing be ordered to determine the voluntary and knowing nature of the plea.

On March 16, 1973, the Appellate Division of the Supreme Court, First Judicial Department, unanimously affirmed petitioner's conviction, without opinion. On April 9, 1973, Hon. Stanley H. Fuld, Chief Judge of the Court of Appeals of the State of New York, denied petitioner's motion for leave to appeal to that court.

During this same period of time, petitioner, acting pro se, moved to vacate the judgment of conviction, pursuant

to Section 440.10 of the Criminal Procedure Law of the State of New York, on the grounds that his guilty plea had been coerced and upon certain errors alleged to have been committed during the course of the trial. Justice Starke denied the motion by order dated November 20, 1972. Subsequently, petitioner's motion for leave to appeal Justice Starke's decision, was denied, as was his motion, made before Justice Starke, to reargue the motion.

ARGUMENT

POINT I

THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD HAVE BEEN GRANTED BECAUSE PETITIONER WAS NOT AWARE OF THE MAXIMUM AND MINIMUM TERMS TO WHICH HE COULD BE SENTENCED UPON HIS PLEA OF GUILTY

The record below is uncontradicted, as the district court held that petitioner was never informed of the maximum and minimum terms to which he could be sentenced upon his plea of guilty. The district court held, however, that "it would be incredible to conclude that petitioner would not have plead guilty had he known that he faced a maximum of twenty-five years," basing this conclusion on the plea offer of six to eighteen years which petitioner had rejected, the statement of the trial court that he faced a "stiff sentence" and

petitioner's prior convictions and prison terms. It is respectfully submitted that in so holding, the district court erred both on the law and on the facts.

The district court recognized that the controlling cases on the issue of the necessity to inform a state court defendant of the maximum and minimum terms to which he might be sentenced upon a plea of guilty are this Court's decisions in United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir.), cert. denied, 419 U.S. 954 (1974) and United States ex rel. Hill v. Ternullo, 510 F.2d 844 (2d Cir. 1975). The court, however, chose to ignore the teachings of those cases and instead relied, in its decision, on two cases, Jones v. United States, 440 F.2d 466 (2d Cir. 1971) and United States v. Welton, 439 F.2d 824 (2d Cir.), cert. denied, 404 U.S. 859 (1971), which dealt with retroactive application of decisions requiring the vacation of judgments because of violation of Rule 11 of the Federal Rules of Criminal Procedure.*

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* The court also relied upon the decision in United States v. Lombardozzi, 436 F.2d 878 (2d Cir.), cert. denied, 402 U.S. 908 (1971). That decision is totally inapplicable to this matter, as the defendant there claimed that his plea had been induced by the government's assurance that his sentence would be concurrent and that he would not have to serve any time in prison. There was no claim made that the defendant lacked knowledge as to the possible consequences of his plea; only that his plea had been induced by a government prediction of the court's action, which prediction was erroneous. That decision certainly does not support the type of analysis made by the district court in the within matter.

In so doing, the district court neglected to examine the rationale behind the Leeson and Hill decisions, a rationale which, it is submitted, requires that the district court's order denying the writ be reversed.

In Leeson, petitioner had been erroneously informed that he faced a maximum term of 1.3 to 2.6 years, while he actually faced an indefinite five-year reformatory term. This Court pointed out that this was not a situation where a plea had been induced by an erroneous prediction of the sentence that petitioner might receive, but was, rather, a plea entered "in ignorance of what the maximum possible sentence was, believing it to be substantially less than that which the court was authorized to impose and which, indeed, it did impose." 496 F.2d 721 (emphasis in original). In reversing the district court's denial of the writ, the Court held that:

> "[A]ppellant's plea was not knowing and was without an understanding of the law inasmuch as he did not know the maximum possible sentence he might receive. It is thus a plea entered in ignorance of its direct consequence, and it is therefore invalid. (citations omitted)" 496 F.2d at 721.

Likewise, in Hill, petitioner claimed that he had made his plea of guilty without knowing the correct maximum or mini-

mum sentences which he might receive. Again, this Court reversed the district court's denial of the writ and remanded, there for an evidentiary hearing as to whether the plea was made without an understanding of the sentencing possibilities. Once again, the Court emphasized that the focus was "not counsel's effectiveness per se but, instead [petitioner's] understanding of the consequences of the plea...." 510 F.2d at 847, n.5.

The district court in the instant case found that petitioner did not know the maximum and minimum terms to which he might be sentenced on his plea of guilty. This, we submit, is tantamount to a finding that petitioner did not understand "the consequences of the plea." The district court, however, chose to turn its attention to a completely different point; its concern, as expressed in its decision, was not whether petitioner understood the consequences of his plea but rather whether he would have made the same plea had he known of its consequences.

There is no support in either Leeson or Hill for the analysis employed by the court below. The decisions in those cases turn on the question of whether petitioner knew the consequences of what he was doing when he decided to plead guilty, not whether the plea would have been made had peti-

tioner been properly informed. The district court replaced this Court's objective test--what petitioner had been told--with its own subjective test of what petitioner would have done had he possessed the appropriate information. In so doing, the district court necessarily made judgments based upon petitioner's prior record and upon its assessment of the record at the trial itself, i.e., whether the evidence against the petitioner was so damaging that he would have wanted to plead guilty regardless of the possible sentence.

This approach is grossly violative of the letter and the spirit of Leeson and Hill because it regards as irrelevant the question of whether petitioner understood the consequences of his plea so long as the court determines that petitioner's intent was to plead guilty regardless of the consequences. It ignores the Due Process basis of the Leeson-Hill rule, as set forth in McCarthy v. United States, 394 U.S. 459, 466 (1969):

> "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (Emphasis added)

It is the obligation of counsel and of the courts to assure that guilty pleas are knowing and are made with an understanding of the law; the cases are clear that once it has been determined that a plea was not knowingly made with an understanding of the law, there is no alternative other than to permit the defendant to withdraw his plea and, with this information in hand, make a new determination of whether he wishes to plead guilty.

The two decisions relied upon by the district court in support of its inquiry as to what petitioner would have done had he known the consequences of his plea, arose in unique situations which render them inapplicable to the instant appeal. In Jones v. United States, 440 F.2d 466 (2d Cir. 1971), defendant's plea was taken in violation of Rule 11 of the Federal Rules of Criminal Procedure, in that he had not been informed of the maximum sentence. Because the plea was taken before the decision of the Supreme Court in McCarthy v. United States, 394 U.S. 459 (1969), that case's per se rule was not applicable under the decision in Halliday v. United States, 394 U.S. 831 (1969) (per curiam). This Court therefore had the authority to fashion a less stringent test than that of McCarthy and did so.

Likewise, in United States v. Welton, 439 F.2d 824 (2d Cir.), cert. denied, 404 U.S. 859 (1971), this Court declared the per se rule of Bye v. United States, 435 F.2d 177 (2d Cir. 1970), which requires vacation of convictions in situations where defendants were unaware of their ineligibility for parole at the time of their plea, not to be retroactive and permitted inquiry as to what defendant would have done had he known the true state of affairs.

There is no suggestion in this Court's opinion in Leeson that pleas entered prior to April 1, 1974, the date of the Leeson decision, were subject to a different test; moreover, any such argument is foreclosed by this Court's application of the Leeson rule in Hill.

Additionally, even assuming arguendo that it is appropriate for the court to determine what petitioner would have done had he known the consequences of his plea, it is submitted that the record does not support the district court's conclusion that petitioner would have pleaded guilty nonetheless. There is no justification for concluding that because petitioner said that he wanted to "hang it up" and the trial court told him that he faced a "stiff sentence", he would have made the plea had he known that he faced a maximum sentence of 25 years. Even the fact that he knew

that he could get as much as an 18 year sentence does not necessarily mean that he would be willing to accept a 25 year sentence; certainly, defendants have decided to take their chances with a jury over differences of less than 7 years. See, e.g., United States ex rel. Leeson v. Damon, supra; Marvel v. United States, 380 U.S. 262 (1965)(per curiam).

It is the inquiry which was apparently made by the district judge in this matter which highlights its improper nature. The court, on the basis of the transcript of the state court trial, appears to have determined that the evidence presented against petitioner was "overwhelming." In making this determination, the district court necessarily drew a conclusion as to the substantive merits of petitioner's state court case. It is respectfully submitted that this type of evaluation is completely improper on a petition for a writ of habeas corpus, where the only question before the district court is whether the petitioner's constitutional rights were violated.

It is respectfully submitted that the only proper inquiry for the district court was whether petitioner's plea was made with knowledge of its consequences. The record is clear that petitioner did not know the maximum or minimum terms to which

he might be sentenced upon his plea of guilty. The order of the district court should therefore be reversed and the petition granted.

POINT II

PETITIONER'S CLAIMS WERE FAIRLY PRESENTED TO STATE COURTS, THEREBY COMPLYING WITH THE EXHAUSTION REQUIREMENTS OF 28 U.S.C. §2254; ALTERNATIVELY, THE ABSENCE OF AVAILABLE STATE CORRECTIVE PROCESS MAKES THIS AN APPROPRIATE PROCEEDING UNDER THE STATUTE

Sections 2254(b) and (c) of Title 28, United States Code, require that petitioner exhaust his state court remedies before his habeas corpus petition can be favorably received. The district court held that petitioner's claims were not fairly presented to the state courts, but addressed the merits of the petition because of the possibility that State corrective processes were unavailable to petitioner. It is respectfully submitted that the district court erred in finding that the standards of Picard v. Connor, 404 U.S. 270 (1971) had not been met; it is alternatively submitted that if the district court was correct as to the failure to meet the Picard test, it was also correct in finding that the unavailability of State court process satisfied the exhaustion requirements of the statute.

Within a month of the imposition of sentence, petitioner filed a notice of appeal from his state court conviction. Petitioner's counsel, The Legal Aid Society, raised in its brief in the Appellate Division of the Supreme Court, First Judicial Department, the question of whether petitioner's plea had been made with knowledge of its consequences. The brief said, in pertinent part, as follows:

> "While counsel's statements about the similarity between the elements of the two offenses [attempted murder and assault in the first degree] does not amount to a request to withdraw the plea, his comments certainly suggest a possibility--if not indeed the liklihood--that appellant's plea was not a fully knowing one, or that appellant had not had adequate time to evaluate his situation when the plea was entered.
>
> When it is borne in mind that there appears to have been no recess taken between the close of the People's case and the offer to plead [sic] guilty, the possibility for mistake or misunderstanding becomes all the clearer. In fact, the record does not reveal how long or how thorough may have been the discussion between client and counsel preceeding entry of the plea. Twenty-one years is a long time. By the investment of a few minutes the possibility of any misunderstanding on appellant's part could have been resolved...." (Brief, page 4) (Footnote omitted)

The brief went on to request that a hearing be ordered to determine the voluntary and knowing nature of the plea.

Sections 2254(b) and (c) do not require that the grounds of the habeas corpus petition be first presented to the state court in haec verba. The Supreme Court, in Picard v. Connor, 404 U.S. 270, 275 (1971), held that the "federal claim must be fairly presented to the state courts", and that the statute is satisfied if "the substance" of the claim has first been presented to the state court. 404 U.S. at 278.

While the exact grounds of petitioner's habeas corpus petition--that petitioner did not knowingly make his plea because he was unaware of the full range of sentences to which he was subject upon his plea--were not presented to the Appellate Division, the substance of the claim was. Knowing the maximum possible sentence to which one is liable upon a plea of guilty is merely one part of the "full understanding of the consequences" of a plea, a necessary prerequisite of a valid plea of guilty. United States ex rel. Leeson v. Damon, 496 F.2d 718, 721 (2d Cir.), cert. denied, 419 U.S. 954 (1974), quoting Kercheval v. United States, 274 U.S. 220, 223 (1927).

Certainly, if the hearing had been granted, petitioner would have had a full opportunity to explain to the court his understanding of the plea; the entire question of whether

petitioner understood the consequences of the plea, including the maximum sentence to which he was subject, would have been before the Court. Thus it is submitted that the substance of petitioner's claim was fairly presented to state courts when it was argued that the plea had not been knowingly made. Petitioner has, therefore, exhausted his state court remedies, and, it is respectfully submitted, this Court should so hold.

Alternatively, it is respectfully submitted that the district court was correct in reaching the merits of the petition because of the absence of available State corrective process, thereby satisfying the requirements of Section 2254(b) of Title 28. In two recent cases under Section 2254, in situations similar to that at bar, this Court has indicated that the petition should be addressed on the merits. United States ex rel. Smith v. Montayne, 505 F.2d 1355, 1358-59 n.4 (2d Cir. 1974); United States ex rel. Leeson v. Damon, supra, 496 F.2d at 721.

Since the absence of a knowing and voluntary plea was the major argument presented to the Appellate Division on the direct appeal of the conviction and that argument was rejected, it seems likely that New York State courts would hold either that petitioner's grounds herein had been previously determined on the merits, New York Criminal Procedure Law, §440.10(2)(a),

or that the failure to raise the specific question of knowledge of maximum sentence on the appeal, despite sufficient facts on the record to have raised the question, N.Y.C.P.L. §440.10(2)(c), require the denial of any motion made pursuant to Section 440.10.

The decision of this Court in United States ex rel. Schaedel v. Follett, 447 F.2d 1297, 1299-1300 (2d Cir. 1971), noted in the district court's opinion, presented an entirely different situation, There, the Court held that the failure to raise objections to evidence at trial and the failure to raise the issue on appeal were strategic decisions that had been knowingly made. There is certainly nothing in the record in the within matter to suggest that the failure to raise the grounds of the petition either before the trial court or on appeal was the product of a strategic decision.

In sum, there is "an absence of available State corrective process", 28 U.S.C. §2254(b) and the petition for habeas corpus should be reviewed on the merits.

CONCLUSION

For all the above reasons, it is respectfully submitted

that the order denying the petition for a writ of habeas corpus should be reversed and the writ issued.

Respectfully submitted,

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MICHAEL R. SONBERG
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November 12, 1975

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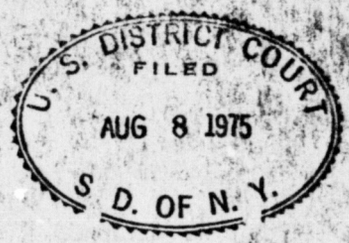

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, ex rel.: JOHN KELLAHER,

Petitioner,

- against -

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent.

- -x

MEMORANDUM DECISION AND ORDER

74 Civ. 4837 (HFW)

#42950

HENRY F. WERKER, D. J.

Petitioner, a state prisoner incarcerated at the Auburn Correctional Facility, seeks a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241, 2254. For the reasons stated herein the writ is denied.

By indictment No. 3446-71 the petitioner was charged with attempted murder and possession of a weapon, N.Y. Penal Law §§ 110.00, 125.05. At trial, the intended murder victim, who miraculously survived five bullet wounds in the head, and a corroborating witness testified against the petitioner. At the close of the People's case, the petitioner indicated to his counsel "Lets hang it up" and decided to plead guilty to both counts of the indictment. Although he could have received a maximum of twenty five years, he was sentenced to a maximum term of twenty-one years and a minimum term of seven years.

Subsequent to his sentence, petitioner moved to

vacate his conviction under § 440.10 of the New York Criminal Procedure Law on the grounds that his plea had been coerced and on the basis of other alleged errors. That motion was denied and leave to appeal from that decision was also denied.

Petitioner also filed a notice of appeal from his judgment of conviction. On appeal he argued that the trial court should have made further inquiries into his understanding of the meaning and consequences of his guilty plea. Specifically, it was argued that at sentencing his counsel read from Article 120 of the Penal Law (assault in the first degree) the elements of which are similar to the crime to which petitioner had plead guilty; and thus any sentence should not exceed the maximum for assault in the first degree (15 years). This argument at sentencing was said to have caused some "confusion" as to whether the plea was knowingly made, and which should have been investigated by the trial court. The Appellate Division, First Department, unanimously affirmed the conviction, without opinion, and leave to appeal to the New York Court of Appeals was denied by then Chief Judge Fuld.

Petitioner then filed this habeas corpus application in which he asserts that his plea was taken in violation of the Fourteenth Amendment because at the time of the plea he was never informed of the maximum or minimum terms to which he might be sentenced. See United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir.), cert. denied, 43 U.S.L.W. 3240 (Oct. 22, 1974); United States ex rel. Hill v. Ternullo, Docket # 74-2351

(2d Cir. February 10, 1975). This court then ordered an evidentiary hearing to determine whether the plea of guilty entered by the petitioner was made with an understanding of the consequences of the plea.

Initially, the Court must determine whether the substance of petitioner's claim has been fully presented to the State Courts. See Picard v. Connor, 404 U.S. 270, 275 (1971). See also United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1130 (2d Cir. 1974) (reasons for requiring exhaustion). The Court concludes that the substance of the argument now advanced by the petitioner, i.e., that his plea was unconstitutional because he was never informed of the minimum or maximum terms of imprisonment, was never presented to the state courts. The argument on appeal in the state court concerned an attempt by counsel to get a lower sentence for petitioner by describing the similarity of petitioner's crime to the crime of assault. The state courts were apparently convinced that there was no "confusion" created by this argument. At no time did petitioner argue that he was never informed of the maximum and minimum sentences he could face, a very specific argument which could have easily been advanced on appeal. Petitioner has not met the Picard standards. See also United States ex rel. Gibbs v. Zelker, 496 F.2d 991 (2d Cir. 1974).

There is, however, the possibility that collateral remedies may no longer be available so that the exhaustion

requirement of 28 U.S.C. § 2254(b), (c) may have been met. See N.Y.C.P.L. § 440.10(2)(a),(c) and United States ex rel. Leeson v. Damon, supra at 721; United States ex rel. Smith v. Montanye, 505 F.2d 1355, 1358-59 n.4 (2d Cir. 1974); But see United States ex rel. Schaedel v. Follett, 447 F.2d 1297, 1299-1300 (2d Cir. 1971). Because of this, the Court will address the merits of the petition.

The record in this case indicates that petitioner was never informed by the trial judge or by any of his assigned counsel of the maximum and minimum sentences which he faced. However, the record also shows that in the course of his state proceedings petitioner had been offered a sentence of six to eighteen years if he plead guilty, but petitioner refused this plea bargain. He was also told by the trial judge at the time of the plea that he faced a very "stiff sentence." Moreover, petitioner was no stranger to the courts and judidicial procedures since he had other convictions and had served prior prison terms.

Weighing all of the circumstances the Court is of the opinion that the plea of guilty was valid. United States v. Lombardozzi, 436 F.2d 878 (2d Cir.), cert. denied, 402 U.S. 908 (1971). The petitioner has not persuaded the Court that his lack of knowledge of the maximum and minimum terms affected his ability to make an intelligent decision. Jones v. United States, 440 F.2d 466 (2d Cir. 1971); United States v. Welton, 439 F.2d 824 (2d Cir.), cert. denied, 404 U.S. 859 (1971). Petitioner knew at least that he faced up to 18 years,

and that he could get a "stiff sentence." It was the overwhelming evidence presented at his trial primarily through the testimony of his victim that made petitioner "hang it up." In light of these factors it would be incredible to conclude that petitioner would not have plead guilty had he known that he faced a maximum of twenty-five years.

Petition denied.

SO ORDERED.

Dated: New York, New York

August 6, 1975

_____

U. S. D. J.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE

PATRICIA M. CLARKSON, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides in Brooklyn, New York. On November 12, 1975, deponent served the within Brief on behalf of Petitioner-Appellant John Kelleher upon LOUIS J. LEFKOWITZ, Attorney General of the State of New York at Two World Trade Center, New York, New York 10047, the address designated by said Attorney General for that purpose by depositing a true copy of the same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

PMClarkson

PATRICIA M. CLARKSON

Sworn to before me this
12th day of November, 1975

Dorothy Levitt

DOROTHY LEVITT
Notary Public, State of New York
No. 31-7522725
Qualified in New York County
Commission Expires March 30, 1976